

BEFORE THE

JAN 27 1993

Federal Communications CommissionFEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20554

In the Matter of

Implementation of the Cable
Television Consumer Protection
and Competition Act of 1992

Rate Regulation

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MM Docket No. 92-266

COMMENTS OF PUERTO RICO CABLE TV ASSOCIATION

The Puerto Rico Cable TV Association (the "Association") hereby files these comments in response to the Notice of Proposed Rulemaking in the above-captioned proceedings (the "Notice"). The Notice seeks comment on specific proposals to implement the rate regulation provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

The Association is made up of cable operators throughout the Commonwealth of Puerto Rico. Puerto Rico is an island which presents certain unique circumstances in the provision of cable television service. In particular, virtually all of the licensed television stations in Puerto Rico program mainly in the Spanish language, and none are affiliated with the major United States networks. In order for the cable systems in Puerto Rico to provide a quality signal of any other broadcast stations than located on the island, whether in Spanish or in English, they

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must be obtained via satellite. This, of course, means the incurring of transmission costs and, under the 1992 Cable Act, will also require cable operators to obtain the retransmission consent with the potential new costs associated with such rights. Moreover, because of the largely rural characteristics of Puerto Rico, and because of the generally more difficult economic conditions on the island, certain other costs are greater than they would be for comparable cable systems on the mainland. These factors add a unique character to the rate regulation issues raised by the Commission in the Notice. In this vein, the Association wishes to comment on certain issues which are of particular importance to its members.

I. EFFECTIVE COMPETITION

The 1992 Cable Act exempts cable systems from regulation of their basic service rates if the FCC finds that the cable system is subject to effective competition. The Act sets out three tests. A cable system is considered subject to effective competition if any one of these tests is met.¹ The first test states that a cable system will be subject to effective competition if less than thirty percent (30%) of the households in the franchise area subscribe to cable service. The Association concurs with the FCC's statement in Paragraph 7 of the Notice that effective competition should be found to exist where less than thirty percent (30%) of the homes in the

¹47 U.S.C. §543(1)(1).

franchise area subscribe to cable television service. The Act clearly establishes that the relevant base is the franchise area. Thus, considerations of how many homes are actually passed by the cable system at any particular point in time is not relevant for this test of effective competition.

This reading of the first effective competition test reflects the realities of cable television service and its environment in Puerto Rico. A cable television operator in a single franchise area may service many different types of customers ranging from a single-family home to a multi-story apartment building. In its franchise area the cable operator faces competition from many different service providers which may target diverse segments of the cable franchise area. Thus, for example, a SMATV operator may target high-rise apartment buildings only. An MMDS operator may target residences within the reach of its signal where direct line of sight can be achieved. A distributor of program packages to TVROs from a satellite may target just rural residences. It also may be that other competition not considered in the test, such as broadcast television and home video, discourages cable subscribership. Puerto Rico has, for example, a diverse range of broadcast stations available to much of the population and a multitude of outlets for the home video user. Thus, Puerto Rico demonstrates vividly why cable penetration measured against residences in the entire franchise area is the proper measure of effective competition.

The second effective competition test measures the effect of competition from other multichannel video competitors such as CATV, MMDS, SMATV, direct broadcast satellite ("DBS"), receive-only satellite program distributors, etc. To meet the test there must be at least one such entity other than the cable operator, its service must be offered to 50 percent of the households in the franchise area, and its penetration must exceed 15 percent of the households. Alternative providers vary in their approach to service and often target only a segment of the total population in the community. For example, a franchise area may contain many multiple dwelling units that are capable of being served by both the franchised cable operator and a SMATV or MMDS operator. The SMATV or MMDS operator may have no plan to offer service throughout the franchise area and is under no franchise obligation to offer such services.

In the Notice, the FCC tentatively concludes that 50 percent of the households are "offered" video programming when it is "actually available" to those households.² This standard, however, permits the competitive video distributors to control whether the cable operator is subject to rate regulation. It provides a tremendous disincentive for these rivals to serve a broader public and possibly free up its greatest competitor, the cable operator, from rate regulation. To better foster competition, the FCC should deem that rival video programmers

²Notice at ¶8.

"offer" programming to a household when they are technically capable of providing their service to that household.

In addition, the 15 percent standard should be an aggregate measurement. A cable operator is no less subject to effective competition from a combination of programming providers totalling 20 percent penetration than from, for example, a single MMDS system with 20 percent penetration.

II. RATE BENCHMARKS

Under the 1992 Cable Act the FCC must ensure that basic rates are reasonable.³ In order to do so, the FCC has proposed adopting either a benchmark rate or a cost-based approach under which an individual system's rate would be examined using traditional cost-of-service principles. The Act requires that regulations governing basic rates must reduce administrative burdens on subscribers, cable operators, franchising authorities and the FCC. The Association agrees with the FCC's tentative conclusion in Paragraph 33 of the Notice to adopt a benchmark approach to basic rate regulation because this alternative would clearly achieve reasonable rates with less administrative burden than traditional cost-of-service regulation.

The Association believes that any benchmark should be calculated on a per channel basis in order to account for differences in the size of basic service offerings. The per-channel benchmark should not be combined with any overall cap on the basic service rate or to leave the franchising authority the

³47 U.S.C. §543(b).

sole determination of whether to allow compensation for cable networks on the basic tier. To do otherwise would make the per-channel rate meaningless for cable operators of systems with numerous broadcast stations, access channels and cable networks. Because of the high costs of addressability and signal security of a multi-tier approach, numerous cable systems in Puerto Rico would like the option of a single basic tier or, at least, one that contains a sizeable group of the discretionary cable services. The fact is that if there was a basic rate cap, cable operators would have no incentive to achieve Congress's goal of adding programming to the basic service level beyond the minimum statutory requirements and, indeed, cable systems would have even greater incentive to remove certain programming services from the basic service that were not statutorily required.

Cable systems in Puerto Rico are regulated by the Puerto Rico Public Service Commission ("PSC"). The PSC has sought broad authority over cable, including the content and rate regulation of non-basic and premium services, even in the post-1984 deregulatory environment.⁴ The Association urges the FCC in this proceeding to again confirm that, despite the enactment of the new cable law, state and local franchising authorities do not have direct rate authority over any tier of service other than

⁴The FCC, in its Report and Order and Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4, adopted June 13, 1991, indicated that efforts of state or local governments to regulate rates for cable service apart from the basic tier was impermissible. 6 FCC Rcd 4545 at ¶59, n.72.

the basic tier and that premium and per channel services remain totally deregulated.

Moreover, no local government agency, regardless of how much general expertise they may have, should be permitted to decide which program services should be included within the basic rate for compensation purposes. Therefore, the Association also recommends that a per-channel benchmark be set with no overall cap on the price so that the basic service can be as large as the cable operator and the subscribers wish it to be.

In setting a per-channel benchmark price, unique costs to particular operators should be taken into consideration. In order to further encourage cable operators not to downsize the basic tier, certain objective cost elements which are not common to all cable operators should be allowed to be added to the per-channel benchmark rate. In the case of Puerto Rico, one prime example is the ability to offer the programming of the major networks. There are no affiliates of the major United States networks in Puerto Rico. In order to offer this service to its subscribers, cable operators in Puerto Rico must import network affiliates from the mainland via satellite. Except in certain rural areas of the mainland, virtually every other cable system is able to carry network stations either as local stations received off-the-air or, at most, as distant stations received either off-the-air or via microwave. The costs of obtaining programming have historically risen far faster than inflation and deserve special treatment by the FCC. This includes not only

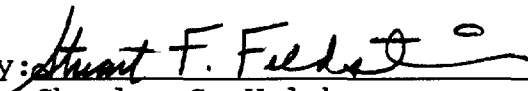
program acquisition costs but also the costs of transmission and distribution. The special cost of receiving such services should be allowed to cable systems in Puerto Rico as a cost passed through beyond the per-channel benchmark rate. In addition, the 1992 Cable Act now requires the obtaining of retransmission consent for the carriage of broadcast signals. Retransmission consent fees for these distant network signals should also be allowable above and beyond the per-channel benchmark rate.

CONCLUSION

The Association therefore urges the Commission to consider the unique posture of cable systems in Puerto Rico as it decides the issues in this proceeding.

Respectfully submitted,

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